

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

60007

FILE: B-183966

DATE: October 2, 1975

97857

MATTER OF: P.T. & L. Construction Co., Inc.

DIGEST:

Where validity of contracting officer's nonresponsibility determination is challenged on basis it was erroneously predicated primarily upon criminal indictment which had been dismissed, such determination is nevertheless reasonable since findings of grand jury underlying indictment adequately support findings of lack of integrity, indictment was dismissed because of procedural deficiencies rather than for insufficiency of evidence, and dismissal has been appealed. Contracting officer's failure to contact prospective contractor regarding responsibility did not affect validity of determination.

Invitation for bids No. DACW51-75-B-0013, for the Elizabeth River Flood Control Project, was issued by the United States Army Engineer District, New York, New York on March 13, 1975. At bid opening on April 17, 1975, P.T. & L. was found to be the low bidder. However, on the basis of information developed during the course of a preaward survey, the contracting officer determined that P.T. & L. was nonresponsible for lack of business integrity and awarded a contract to the second low bidder. P.T. & L's protest to this Office followed.

In his nonresponsibility determination dated May 16, 1975, the contracting officer noted that on December 27, 1974, the New Jersey Department of Transportation had suspended P.T. & L. and its president from bidding or performing on any projects of the Department, and that such suspension was still in effect. Furthermore, he reports having learned from a Deputy Attorney General and the Director of the State Division of Criminal Justice that P.T. & L. and its president had been indicted in the State of New Jersey in November 1974 for an alleged illegal act performed by them in connection with the award of a State highway paving contract; that the substance of the illegal acts charged is that P.T. & L. arranged for the only other bidder on the contract to submit a noncompetitive bid for the payment by P.T. & L. of \$180,000; that at the trial on the indictment, after completion of the State's case, the indictment was dismissed because of procedural deficiencies in the presentation of the case rather than for insufficiency of evidence; and that the State had appealed the dismissal. Therefore, the contracting made the following determination:

"4. Based on all the above information, I find that there is substantial evidence which casts serious doubts as to the integrity of the subject contractor and that such evidence creates a strong suspicion that one or more principal officers of subject contractor committed wilful acts of fraud against the State of New Jersey in submitting a bid for a large construction project of that State. I hereby determine that subject contractor is nonresponsible within the meaning of the provisions of ASPR 1-903.1 (iv)."

P.T. & L. contends that the contracting officer's determination was clearly erroneous since it was based primarily upon an indictment which had been dismissed. Furthermore, it is argued that P.T. & L's continued disqualification from bidding on New Jersey State highway contracts provides no basis for the contracting officer's determination since no administrative hearing was ever held with respect to such disqualification and no findings have been made by the State with regard to P.T. & L's qualifications as a bidder. In this connection, it is stated that although the opportunity for a hearing was extended by the State, the disqualification was not challenged because of the paucity of available State work and because P.T. & L. was advised by counsel that a hearing could possibly prejudice the related criminal proceeding currently on appeal by the State. Finally, P.T. & L. also contends that under the applicable regulations the contracting officer's inquiry should have included contact with P.T. & L. and should not have been limited to discussions with personnel of the New Jersey Attorney General's Office. It is contended that such contact would have revealed that P.T. & L's disqualification by the State has "no real meaning" with respect to its responsibility and integrity.

Contracts pursuant to formal advertising are required to be awarded, under 10 U.S.C. § 2305(c), "to the responsible bidder whose bid conforms to the invitation and will be the most advantageous to the United States." In this connection, Armed Services Procurement Regulation (ASPR) § 1-902(1974 ed.) provides that a prospective contractor must demonstrate affirmatively his responsibility and the contracting officer shall make a determination of nonresponsibility if the information bearing on the matter does not indicate clearly that the prospective contractor is responsible. In order for a prospective contractor to be determined responsible, he must have a satisfactory record of integrity. ASPR § 1-903.1(iv) (1974 ed.).

Whether evidence of a bidder's lack of integrity is sufficient to warrant a finding in a particular case that a bidder is not responsible is a matter primarily for determination by the contracting officer of the procuring agency, and we will not

substitute our judgment for that of the contracting officer unless there is no reasonable basis for his determination. 48 Comp. Gen. 769, 773 (1969); 51 Comp. Gen. 703, 709 (1972). While we do not believe that mere suspicions or allegations are sufficient evidence to support a finding of nonresponsibility, the indictment of a corporation's president for an offense enumerated in ASPR § 1-605.1(1974 ed.) as a cause for suspension of bidders has been held to constitute an adequate basis for a determination of nonresponsibility. 51 Comp. Gen. 703, supra; B-179182, October 30, 1973. Under ASPR § 1-605.1(i)(A) a firm may be suspended, upon adequate evidence of the commission of fraud or a criminal offense as an incident to obtaining, or attempting to obtain, a public contract. It is clear, therefore, that an indictment of P.T. & L's president for the charges stated in the indictment would be sufficient to support a nonresponsibility determination.

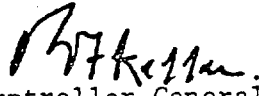
With regard to the effect of dismissal of the indictment, it has been recognized that adequate evidence for suspension does not require the kind of showing necessary for a successful criminal prosecution or a formal debarment, but may be likened to the probable cause necessary for an arrest, a search warrant, or a preliminary hearing. B-179182, supra. Since the effect of a determination of nonresponsibility for a particular procurement is of a less serious consequence than a suspension, certainly the nature of the evidence necessary to support a nonresponsibility determination need not be any greater than that required to support a suspension. In making his negative determination, the contracting officer took cognizance of the investigation and findings of the grand jury underlying the indictment, as well as information in connection therewith obtained orally from a Deputy Attorney General and the Director of the State Division of Criminal Justice. With regard to the fact that the indictment had been dismissed, he noted that it had not been dismissed for the insufficiency of the evidence but because of procedural deficiencies involving the State's presentation of the case. In addition, the contracting officer noted that dismissal of the indictment had been appealed by the State. In these circumstances, we believe there was a reasonable basis for the contracting officer concluding that "there is substantial evidence which casts serious doubt as to the integrity of the subject contractor" and, therefore, there is no basis for our Office to interfere with his determination of nonresponsibility.

Finally, we agree with P.T. & L. that ASPR 1-905.3(1) contemplates the contracting officer obtaining information from the prospective contractor regarding his responsibility. However, since it appears that such contact would have only revealed that P.T. & L. had not asked for a hearing on the State's disqualification because of the paucity of State business and to avoid prejudicing

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any criminal proceedings, we do not believe the failure to contact P.T. & L. affects the validity of the determination.

Accordingly, the protest is denied.


Deputy Comptroller General
of the United States